

A-593

FEB 25 1983

ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

RICHARD J. ROME,
Petitioner,

v.

SUPREME COURT OF KANSAS,
Respondent.ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUITBRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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February, 1983

QUESTION PRESENTED FOR REVIEW

Is An Action Moot Under
Circumstances Where No Court Could
Possibly Grant The Relief Requested By
The Petitioner?

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OPINIONS BELOW

There are two opinions below in this action. The Honorable Luther B. Eubanks, United States District Court Judge, filed his Order of Dismissal with Prejudice in this action on March 23, 1981. A copy of that Order is attached as Appendix C to Petitioner's Petition for a Writ of Certiorari. The other opinion was filed August 19, 1982, by the Tenth Circuit Court of Appeals dismissing Petitioner's appeal to that Court as moot. A copy of that Opinion is attached as Appendix B to Petitioner's Petition for a Writ of Certiorari.

There are two other opinions connected to this action which Petitioner failed to bring to the Court's attention. Those opinions are of the Kansas Supreme Court in Kansas, ex rel. Commission on Judicial Qualifications v. Rome, 229 Kan. 195, 623 P.2d 1307 (1981) cert. denied

sub. nom. Rome v. Kansas, 454 U.S. 830 (1981) reh. denied 454 U.S. 1094 (1981), and In Re Rome, 218 Kan. 198, 542 P.2d 676 (1975).

STATEMENT OF CASE

On February 10, 1981, the Kansas Supreme Court, upon a finding that Petitioner, then a Kansas associate district judge, had violated Canons 1, 2, 3A(1), 3A(3), and 3A(6) of the Code of Judicial Conduct, ordered Petitioner removed from office, forthwith. Kansas, ex rel. Commission on Judicial Qualifications v. Rome, supra.

On March 5, 1981, Petitioner filed a "voluminous, rambling and self-serving complaint against the Supreme Court of the State of Kansas" in which his only requested relief, other than attorney fees, was stated by Petitioner to be:

1. This is a civil action for temporary injunctive relief on behalf of the Plaintiff against the Defendant, pending the filing and hearing of a petition for a writ of certiorari to The United States Supreme Court by the Plaintiff for review of a decision by Defendant against said plaintiff, removing

him from the office of Associate District Court Judge of the 27th Kansas Judicial District, Position I, on February 10, 1981.

2. Pending the filing by and hearing of the Plaintiff's petition for a writ of certiorari to The Supreme Court of the United States for a review of Defendant's decision against him in the State case referred to above, stay or enjoin the Defendant from implementing or enforcing it's order of removal, dated February 10, 1981, and the denial of the order for rehearing, dated March 2, 1981, including the convening of the 27th Kansas Judicial District Nominating Commission to select or appoint a successor to Plaintiff's former office, or to otherwise change the status quo of the situation existing prior to 8:30 A.M., February 10, 1981, in regard to said plaintiff. [See ¶¶1 and 2 of Respondent's Complaint in Case No. 81-1084 as filed in the United States District Court, Wichita, Kansas, on March 5, 1981.]

The District Court, exercising its discretion, implemented the doctrine of abstension and dismissed the action on March 23, 1981. See Appendix C, Respondent's Petition for Writ of Certiorari to the United States Supreme Court. See also, Younger v. Harris, 401

U.S. 37 (1971) and especially, Middlesex County Ethics Comm. v. Garden State Bar Ass'n., ___ U.S. ___, 102 S.Ct. 2515 (1982). For a similar case arising out of this District, please see State v. Phelps, 226 Kan. 371, 598 P.2d 180 (1979) cert. denied 444 U.S. 1045 (1980) and Phelps v. Kansas Supreme Court, 662 F.2d 649 (10th Cir. 1981) cert. denied, ___ U.S. ___, 102 S.Ct. 2009 (1982) reh. denied ___ U.S. ___, 102 S.Ct. 2917 (1982).

The District Court dismissal was appealed by Petitioner to the Tenth Circuit Court of Appeals on or about April 6, 1981, where it remained until its dismissal on August 19, 1982.

In the meantime, Petitioner did file in this Court for a writ of certiorari to the Kansas Supreme Court from its judgment in Kansas, ex rel. Commission on

Judicial Qualifications v. Rome, supra.

On October 5, 1981, this Court denied certiorari. 454 U.S. 830 (1981) and later denied Petitioner's motion for rehearing, 454 U.S. 1094 (1981). Since Petitioner's only requested relief in this action was for a temporary injunction to allow this Court to consider the allegations raised in his petition for a writ of certiorari, this entire case became moot on November 30, 1981, when this Court denied Petitioner's motion for rehearing.

Respondent moved to dismiss the instant action on May 6, 1982, because, as explained above, the case was moot. The Tenth Circuit Court of Appeals granted Respondent's motion on August 19, 1982. See Appendix B of Petitioner's Petition for Writ of Certiorari. From that order, Petitioner seeks a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

1. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DID NOT HAVE SUBJECT MATTER JURISDICTION IN THE FIRST INSTANCE IN THIS CASE.

While the District Court properly dismissed this action under the doctrine of abstention, pursuant to Younger v. Harris, supra, Middlesex County Ethics Comm. v. Garden State Bar Ass'n., supra, and Phelps v. Kansas Supreme Court, supra, it probably did not have subject matter jurisdiction in the first place.

This Court and many federal courts have held on numerous occasions that lower federal courts do not have subject matter jurisdiction to review state disbarment proceedings had before state courts, even though the state court proceedings are alleged to have been constitutionally deficient. Selling v. Radford, 243 U.S. 46 (1917); Theard v.

U.S., 354 U.S. 278 (1957); Schware v. Board of Bar Examinations of New Mexico, 353 U.S. 1232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962); Mayes v. Honn, 542 F.2d 822 (10th Cir. 1976); Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976); MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969) cert. denied 396 U.S. 960 (1969); Ginger v. Circuit Court for County of Wayne, 372 F.2d 621 (6th Cir. 1967) cert. denied 387 U.S. 935 (1967); Feldman v. State Board of Law Examiners, 438 F.2d 699 (8th Cir. 1971); Jones v. Hulse, 391 F.2d 198 (8th Cir. 1968) cert. denied 393 U.S. 889 (1968); In Re MacNeil, 266 F.2d 167 (1st Cir. 1959); Clark v. State of Washington, 366 F.2d 678 (9th Cir. 1966); Lenske v. Sercombe, 266 F.Supp. 609 (D.C. Ore. 1967) aff'd., 401 F.2d 520 (9th Cir.

1968); Turner v. American Bar Association, 407 F.Supp. 451 (W.D. Wis., 1975); Diehl v. United States, 438 F.2d 705 (5th Cir. 1971) cert. denied 404 U.S. 830 (1971); Polk v. State Bar of Texas, 480 F.2d 998 (5th Cir. 1973); Saier v. State Bar of Michigan, 293 F.2d 756 (6th Cir. 1961); Mildner v. Gulotta, 405 F.Supp. 182 (E.D. N.Y. 1975); Tang v. Appellate Division, 487 F.2d 138 (2d Cir. 1973) cert. denied, 416 U.S. 906 (1974); Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (6th Cir. 1970); Getty v. Reed and Collis v. Reed, cons'd, 547 F.2d 971 (6th Cir. 1977); Niles v. Lowe, 407 F.Supp. 132 (D.C. Ha. 1976); and Phelps v. Kansas Supreme Court, supra.

This fundamental law is not changed by labeling the cause as a "civil rights" action, nor is it changed simply because this case involves the disciplining of a

judge as opposed to an attorney. In fact, the reasons are even stronger for the federal courts to stay out of such state judicial administration.

Petitioner neither here nor below has ever established that any federal court has jurisdiction over the subject matter of this action.

2. THIS COURT SHOULD NOT REVIEW THIS ACTION BECAUSE PETITIONER HAS PREVIOUSLY RAISED HIS SUBSTANTIVE ISSUES AND HAD THEM DETERMINED BY THE KANSAS SUPREME COURT AND THIS COURT.

Petitioner does not raise any issue in this action which has not been previously considered by the Kansas Supreme Court and by this Court in Kansas, ex rel. Commission on Judicial Qualifications v. Rome, 229 Kan. 195, 623 P.2d 1307 (1981) cert. denied sub. nom. Rome v. Kansas, 454 U.S. 830 (1981) reh. denied 454 U.S. 1094 (1981).

Petitioner has not been "wronged" by anyone throughout these proceedings, and a further waste of judicial time should not be allowed by this Court.

3. THERE ARE NO DECISIONAL CONFLICTS BETWEEN THIS COURT AND THE CIRCUIT COURTS OF APPEALS OR STATE COURT DECISIONS.

Petitioner never cites any decisional conflict between this case below and any other court opinion. Respondent can find none.

Without a decisional conflict, this Court should deny the petition for a writ of certiorari because it raises no issue about which there is a conflict or any indecision on the part of lower courts.

4. PETITIONER HAS NOT PRESENTED AN ISSUE OF NATIONAL IMPORTANCE, NOR HAS HE PRESENTED AN IMPORTANT FEDERAL QUESTION.

Petitioners seeking a writ of certiorari from this Court have an

obligation to demonstrate that there are special and important reasons for granting the writ of certiorari. It is not a remedy for achieving "individual justice in individual cases." Wright, Miller, Cooper and Grossman, Federal Practice and Procedure, Jurisdiction §4004.

It is Petitioner's burden to show he is presenting an important question of federal law or an issue of national importance. He has totally failed to do either in his petition.

The only real issue raised in this case is whether a state supreme court may, under adequate substantive and procedural law, issue a ruling with finality in its own jurisdiction as to who may sit as a judge on one of its lower state courts. Respondent respectfully submits that a state supreme court is in a much better

position than this Court to judge the ethics of a judge in its jurisdiction and to determine who is worthy to be a Kansas associate district court judge.

The Kansas Supreme Court has found Petitioner to be unfit to be a Kansas judge, a finding which should not be disturbed by this Court.

5. THIS ACTION IS MOOT BECAUSE THE ONLY RELIEF EVER REQUESTED BY PETITIONER CANNOT NOW BE GRANTED BY THIS COURT OR BY ANY COURT.

Black's Law Dictionary, (5th ed. 1979), p. 909, defines when a case is moot by stating:

A case is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Leonhart v. McCormick, D.C.Pa., 395 F.Supp. 1073, 1076. Question is "moot" when it presents no actual controversy or where the issues have ceased to exist. Matter of Lawson's Estate, 41 Ill.App.3d 37, 353 N.E.2d 345, 347.

Generally, an action is considered "moot" when it no longer presents a justiciable controversy because issues involved have become academic or dead. Sigma Chi Fraternity v. Regents of University of Colo., D.C.Colo., 258 F.Supp. 515, 523. Case in which the matter in dispute has already been resolved and hence, one not entitled to judicial intervention unless the issue is a recurring one and likely to be raised again between the parties, Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1.

As explained in the Statement of Case, Petitioner's ONLY requested relief was for a temporary injunction staying the Kansas Supreme Court's order removing Petitioner from the office of Associate District Judge of Reno County, Kansas, until Petitioner could seek review of that order before this Court.

Petitioner did, years ago, seek that review and this Court, on October 5, 1981, denied Petitioner's petition for a writ of certiorari in Rome v. Kansas, 454 U.S. 830 (1981), reh. denied 454 U.S. 1094 (1981).

No court, nor any other body, could possibly grant Petitioner's requested relief at this time. Petitioner's cause of action is moot and his continued prosecution of this case possibly violates the intent of 28 U.S.C. §1927 and DR 7-102(A)(2) of the A.B.A. Code of Professional Responsibility.

CONCLUSION

The Tenth Circuit Court of Appeals reached the correct result when it found this action to be moot. That decision for the reasons stated above should not be reviewed by this Court. Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, BRUCE E. MILLER, a member of the Bar of this Court and counsel of record for Respondent herein, hereby certifies that on the 18th day of February, 1983, he caused to be served the foregoing Brief in Opposition to the Petition for Writ of Certiorari, together with Respondent's Appendices A, B, and C, on Petitioner in this appeal, by mailing three (3) copies thereof by ordinary mail, postage prepaid, addressed to:

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